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## **T&E - 2005-02**

**TO:** Larry Doyle, Chief Legislative Counsel, State Bar Office of Governmental Affairs

**RE:** Confidentiality Exception: Mentally Impaired Clients (ABA MRPC 1.14)  
Project No. 2003-04

### **Section Action:**

Date of Approval by Trusts and Estates Section Executive Committee:

Approval Vote: 10/25/03, 22 for, 1 against

Date of Approval by Trusts and Estates Section Incapacity Committee: Approval Vote: 8/25/03;  
10/20/03 (minor modifications), unanimous.

### **Section/Committee and Contact:**

Section/Committee: Trusts and Estates Section

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**Digest:**

California currently has no rule that specifically addresses the obligations of a lawyer who represents a mentally impaired client, and, to the extent that statutory and case authority address the issue, they tend to conflict with a growing number of other jurisdictions, as well as to be internally contradictory.

Business and Professions Code Section 6068(e) currently provides:

It is the duty of an attorney to do all of the following: . . . (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

Evidence Code Sections 952 and 954 define and provide for the protection of disclosure of confidential information communicated from a client to an attorney, with exceptions in the case of the commission of a crime or a fraud or to prevent a client from committing a crime.

The American Bar Association recently revised Rule 1.14 of its Model Rules of Professional Conduct to provide as follows:

“MRPC 1.14 - Client Under a Disability

(a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

Ethical rules revision committees in 19 states,<sup>1</sup> not including California, have written reports and have all recommended adoption of the revised text of Rule 1.14 as set forth above. All eight states (Arizona, Delaware, Idaho, Montana, New Jersey, North Carolina, South Dakota, and Virginia) which have revised their rules since the development of the ABA revision have adopted the new rule language, including the confidentiality exception included in subdivision (c).

Ethics opinions from the California State Bar and from the Bar Associations of San Diego, Los Angeles and San Francisco interpret the provision of the current statutory framework differently, with the State Bar, San Diego and Los Angeles concurring that an attorney with a mentally impaired client may take no action which would disclose the client's secrets and the San Francisco opinion holding that the attorney in such a situation may take action to protect the client. The State Bar's Estate Planning, Trust, and Probate Section (now the Trusts and Estates Section), in its Guide to the California Rules of Professional Conduct For Estate Planning, Trust and Probate Counsel (1997), advocated adoption of a rule of professional conduct similar to the ABA Model Rule 1.14.

This proposal would remedy the current lack of a provision in California, and would also provide guidelines for attorneys dealing with a mentally impaired client. At the same time, the provision would not allow an attorney to take steps to conserve a client, which steps are authorized by the ABA Model Rules. Thus, the proposed rule preserves to the greatest extent possible California's strict prohibition against taking positions adverse to a client, allowing an attorney only to act to protect the interests of the client, and then only to the most limited extent.

#### **Application:**

This bill will enable an attorney to notify the proper individuals or entities of limited facts necessary to protect the attorney's client where the attorney reasonably believes that the client is at risk of substantial physical, financial or other harm due to the client's impairment.

#### **Illustrations:**

An attorney represents a client who has no close relatives and has become very attached to the client's caregiver. The attorney believes, based upon conversations with the client, that the client would meet the standard for imposing a conservatorship because the client has exhibited

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<sup>1</sup> The following state ethical review committees have proposed adoption of the revised text of MRPC 1.14, with the exceptions noted below: AZ, AR, DE, FL, IL, IN, IA, LA, MD, MI, MN, MT, NJ, NC, OR, PA, SC, SD, VA

LA: (b), at the end: replaces "guardian ad litem, conservator or guardian" with "fiduciary, including a guardian, curator or tutor, to protect the client's interests."

AR: (b) adds at the end: Extreme caution must be exercised by a lawyer before nominating the lawyer, a member or employee of the lawyer's firm, or a relative within the third degree or relationship to serve as guardian ad litem, conservator or guardian.

symptoms such as extreme short-term memory loss and confused thinking. The attorney has learned from the client that the client wrote a check to the caregiver for \$10,000 for a Christmas gift and intends to transfer her checking account into a joint tenancy account with the caregiver. The attorney knows, solely from prior conversations with the client, that the caregiver has a gambling problem and is concerned that the proposed transfer of assets will harm the client and lead to her losing substantial funds. The client has not authorized the attorney to tell anyone about this. If this legislation were in place, the attorney could notify either a family member or an entity, such as APS, to investigate the actions of the caregiver prior to the client's losing substantial funds to the caregiver.

**Documentation:**

The author is unaware of any documentary evidence of the problem, beyond ongoing discussions among estate planning and elder law attorneys. There is a substantial accumulation of anecdotal evidence contributed by members of the Section's Executive committee relating examples of clients who have been victims of neglect or abuse and whose attorneys, aware of such neglect or abuse, have not been authorized to seek assistance for their clients.

**History:**

Although there have been several attempts to make changes consistent with the present proposal at the level of the State Bar's former Conference of Delegates in the past few years, no similar proposal of legislation has been made, although the rationale behind this language, that there are certain public interests that must prevail over attorney-client privilege in certain circumstances, supported the recent passage of AB 1101, which amended Business and Professions Code Section 6068(e) to allow disclosure of attorney-client privileged information in strictly limited criminal law contexts.

**Pending Litigation:**

None known.

**Likely Support/Opposition:**

The Trusts and Estates Section will support this legislation. Similar proposals have been discussed by the Conference of Delegates of the State Bar in prior years, but none has been adopted. Those persons supportive of AB 1101 are more likely to be supportive of this (AB 1101 was sponsored by Assembly member Steinberg) and those groups that opposed AB 1101 are likely to be against this proposal as well. This proposal would be supported by ABA members as it brings California law in line with ABA rules. Groups concerned with elder abuse are likely to be supporters of this proposal, which was enthusiastically endorsed in concept by the October 2003 Financial Elder Abuse Seminar organized by the San Francisco Consortium for Elder Abuse Prevention.

**Fiscal Impact:**

No anticipated fiscal impact.

**Germaneness:**

This proposed legislation regulates the conduct of attorneys, particularly those attorneys practicing in the trusts and estates section and is thus uniquely within the scope of the section's interests and knowledge.

**Proposed Legislation:**

SECTION 1. Section 6068.5 is added to the Business and Professions Code, to read:

6068.5. Notwithstanding subdivision (e) of Section 6068:

(a) If a client's capacity to make adequately considered decisions in connection with a representation is significantly impaired, the attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

(b) If the attorney reasonably believes that the client has significantly impaired capacity and as a result thereof 1) is at risk of substantial physical, financial, or other harm unless action is taken, and 2) cannot adequately act in the client's own interest, the attorney may, but is not required to, notify those individuals or entities that have the ability to take action to protect the client.

(c) If an attorney takes action pursuant to paragraph (b), above, the attorney is authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) Nothing in this section permits an attorney to file, or represent a person filing, a conservatorship petition or similar action concerning the attorney's client, where the attorney would not otherwise be permitted to do so, nor to take a position adverse to the client beyond the notification permitted in paragraph (b), above.

(e) "Significantly impaired capacity" as used in this section shall mean that the client suffers from an impairment that would be sufficient to support a determination of incapacity under Probate Code Sections 811(a) and (b).

(f) An attorney shall not be held liable for taking or forbearing to take the action authorized by this section.